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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-680, Howes v. Fields.

5 Mr. Bursch.

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This case raises two issues. The first is
11 whether the right against self-incrimination requires
12 that a prisoner always be Mirandized before being
13 interviewed in isolation about conduct that occurred
14 outside the prisoner. The second is an AEDPA question,
15 whether this Court in Mathis clearly established such a
16 per se rule. For three reasons, the answers to both
17 questions is no.

18 First, for nearly 50 years this Court has
19 declined to adopt any new per se rule that always
20 requires a Miranda warning, instead considering all the
21 circumstances. Lower court --

22 JUSTICE SOTOMAYOR: Don't you think being in
23 custody itself is a circumstance?

24 MR. BURSCH: Sure, it's a circumstance that
25 goes into the all-the-circumstances missed.

1 JUSTICE SOTOMAYOR: What's all this
2 "all-circumstances mix? I thought that our case law was
3 fairly clear that all circumstances is a test for
4 voluntariness. I thought the issue has always been
5 under Miranda: Is the person free to go or not?

6 MR. BURSCH: That's correct, we agree that
7 that --

8 JUSTICE SOTOMAYOR: So since when have we
9 imported of the language of voluntariness into the
10 Miranda test? Should we be creating yet another test?

11 MR. BURSCH: Justice Sotomayor, there are
12 two separate tests. And I go back just to last term in
13 the J.D.B. case.

14 JUSTICE SOTOMAYOR: So go to the test of
15 freedom to leave.

16 MR. BURSCH: Yes.

17 JUSTICE SOTOMAYOR: You're taken from your
18 cell and locked into a room -- and let's change the
19 facts --

20 MR. BURSCH: Yes.

21 JUSTICE SOTOMAYOR: -- and locked in a room
22 and said: Talk to me; you have to tell me what
23 happened. Is that person free to go?

24 MR. BURSCH: It would be much more
25 difficult, but the test would be whether a reasonable

1 person in the prisoner's position felt that they were
2 free to go back to their cell in accord with reasonable
3 ordinary prison procedures. And that would be the test
4 that's consistent with J.D.B. and I submit with every
5 Miranda case that this Court has issued in the last --

6 JUSTICE SOTOMAYOR: All right. So what
7 makes this case different? He's taken from a -- Except
8 being told that he could leave. If he had been taken
9 from his cell, removed from the prison, his normal
10 setting, taken by armed guards to another building, and
11 with guards at the door, sat down and told: Talk to us
12 about this incident. Why would he think he was free to
13 leave? There is one fact I'm taking out of it, which is
14 that he was told he was free to go.

15 MR. BURSCH: Right. There are a number of
16 circumstances that kind of culminate in what I consider
17 to be the two most important. Remember the background
18 circumstances: He was in a room that was not locked.
19 It was a conference room, not an interrogation room with
20 a bright light. He was not shackled. He was not
21 threatened. He was not physically harmed in any way.
22 The two big ones are: One, that when he started to
23 become belligerent, the guards told him that: If you
24 don't want to cooperate, then you will have to go back
25 to your cell; you will have to leave. And that is the

1 exact opposite of Miranda custody, where --

2 JUSTICE SOTOMAYOR: As I see the record, he
3 claims twice he said: I don't want to talk to you. And
4 when he asked to leave at the end, it took 20 minutes,
5 and they continued the questioning. Doesn't that
6 counter the rest of what you are saying?

7 MR. BURSCH: There are two factors that go
8 into the mix, and I will discuss each one in turn. When
9 he says, I don't want to talk any more, then he went on
10 and kept talking. You have to consider, well, why does
11 he keep talking? Well, the record shows, I think a fair
12 reading of it anyway, that he was trying to explain to
13 the officers this timeline he keeps talking about.

14 At the end, when it was a 20-minute delay,
15 there is no contention that that was anyhow inconsistent
16 with reasonable prison procedures. And the fact that it
17 could have been 20 minutes, it could have been 30
18 seconds, it could have been an hour, depending on
19 procedures, demonstrates why a per se rule doesn't make
20 sense. We should look at all the circumstances.

21 JUSTICE GINSBURG: Why is per se rule
22 necessarily what is being argued here? For one thing,
23 he had no choice but to go with the police, right?

24 MR. BURSCH: That's correct.

25 JUSTICE GINSBURG: So it's different from

1 some cases where the prisoner initiates the
2 conversation.

3 MR. BURSCH: That is a little bit different.
4 But the key facts here are, one, at the beginning, the
5 questioning officers say: You're free to stop this and
6 go back to your cell. Then in the middle, he gets
7 belligerent, and they say: If you don't want to
8 cooperate, you have to leave, you have to go back to
9 your cell, which is, I submit, the opposite of Miranda
10 custody.

11 And then when he finally invokes his right
12 to go back to his cell, it is immediately honored, with
13 of course the 20-minute delay due to prison procedures.
14 And so from beginning to end, a reasonable person in his
15 position could have believed they were free to return.
16 And that is all that Miranda requires.

17 In fact, we have a trial court finding on
18 that, on three of them: One, that he was told he was
19 free to go; second, that he understood he was free to
20 go; and third, that he was free to go, and that's all --

21 JUSTICE GINSBURG: And it doesn't make any
22 difference that they took him from his cell, he was
23 under compulsion to leave with them and interrogated
24 during the hours when prisoners are ordinarily sleeping?

25 MR. BURSCH: Again, I would submit those are

1 all circumstances that should go into this "all the
2 circumstances" consideration. You know, there were also
3 other things that militated in favor of the trial court
4 findings, such as the explicit instruction that he was
5 free to leave; that he would have to go back if he
6 didn't cooperate; that they did honor his request to
7 leave, once made. So these are all the things that the
8 Court should look at.

9 And you can imagine the number of other
10 situations, maybe with facts different than these, where
11 a per se rule would be wholly inappropriate. You know,
12 what if they had invited him to come down and he had the
13 choice at the beginning? What if someone was stationed
14 outside the door and took him immediately as soon as he
15 said: I'm ready to go back. It just demonstrates that
16 this isn't the place for a per se rule; that we should
17 just follow the same Miranda test that has been applied
18 for 50 years, and that's all the circumstances.

19 JUSTICE KAGAN: General, when you say that,
20 I took sometimes your brief and the U.S. Government's
21 brief to be saying something more, which is that it's
22 not all the circumstances; it's all the circumstances
23 minus circumstances that are attendant upon normal
24 prison living.

25 So are you still arguing that, or are you

1 really arguing an all-the-circumstances test?

2 MR. BURSCH: We are not taking quite that
3 strong a position. We are arguing all the
4 circumstances. And the analogy that I would draw is
5 just like in the J.D.B. case last term, that you would
6 consider not only the age of the suspect, but also the
7 school environment. So I'm not saying the prison
8 environment is taken out of the equation, just that it's
9 not dispositive in and of itself, just like this Court
10 held in Shatzer.

11 JUSTICE KAGAN: So a court can still think,
12 when it's doing an all-the-circumstances inquiry, it can
13 still factor in something like, you know, it just -- it
14 was going to take him an hour to get back to his cell?
15 That's still something that the court can consider along
16 with everything else. Is that right?

17 MR. BURSCH: Not only can, but should,
18 absolutely.

19 And, you know, one of the benefits of having
20 a per se -- I'm sorry -- of having an
21 all-the-circumstances rule, rather than a per se rule,
22 is that it encourages truthful, voluntary confession.
23 And this Court has repeatedly recognized that such
24 confessions are an unmitigated social good. That's
25 something that we want. And you can imagine again that

1 there are a variety of non-prison contexts where it
2 would certainly be easier to have a per se rule. You
3 could have done that in J.D.B.

4 You know, it's so coercive to take an
5 8-year-old child to the principal's office with an
6 officer to question him, that per se is always going to
7 be some child version of the Miranda rule. But we don't
8 do that. Or if you had someone in the hospital and they
9 were in such a position that they were physically unable
10 to leave. We don't have a hospital Miranda rule. There
11 shouldn't be one in prison, either. We should just take
12 all the circumstances into account.

13 And I think really the lesson of Shatzer is
14 that we start, Justice Kagan, right where you did, that
15 just simply being in prison, being interrogated -- I'm
16 sorry -- being in jail alone is not enough. But it's
17 going to become one factor that we consider in this
18 larger test.

19 CHIEF JUSTICE ROBERTS: Which way do you
20 think that factor cuts?

21 MR. BURSCH: In this particular situation?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MR. BURSCH: I think it cuts in our favor,
24 as the trial court found, and the court should defer to
25 that, for all the reasons I just stated: That he was

1 not threatened; not physically harmed, he was in a
2 conference room; door wasn't locked. Of course, the big
3 two: That when he got belligerent they told him: If
4 you don't want to cooperate, you have to leave, the
5 opposite of Miranda custody when you say, if you don't
6 cooperate, you will not be permitted to leave; and also
7 that when he made the request to go, it was honored
8 within the amount of time that they would have expected
9 per prison policy. So --

10 JUSTICE KENNEDY: Except when they say you
11 have to leave, one way to interpret that or to analyze
12 that might be to say: You are in custody no matter.

13 MR. BURSCH: Justice Kennedy, I don't think
14 that's the case because --

15 JUSTICE KENNEDY: And when you say: You
16 have to leave, that's almost coercive, coercive of him
17 to say, because he doesn't want to have to go back in
18 the cell.

19 MR. BURSCH: I don't think that's the case
20 because under Shatzer there's nothing Miranda custodial
21 about simply being in his cell. And if he wants to stay
22 away from his cell, as it appears to here because he was
23 trying to explain himself, that's one of those factors
24 that militates against a finding of --

25 JUSTICE KENNEDY: But I think it makes your

1 case weaker, not stronger, that statement.

2 MR. BURSCH: I think it makes it stronger,
3 because in the typical Miranda case you would say to
4 someone: If you don't cooperate, we are going to keep
5 you here as long as it takes. And here they were saying
6 just the opposite. And the message they sent was sent
7 was consistent with the instructions they gave him at
8 the beginning: If you tell us you want to leave, we
9 will honor that request, and consistent with what
10 actually happened at the end. He said, I want to go
11 back, and they honored that request.

12 And I think one of the other factors that
13 you put in the mix here is that we were dealing with
14 outside officers, not inside prison officers. These
15 outside officers did not have the ability to impact his
16 day-to-day prison life the way someone inside the prison
17 would.

18 Now, one other point I want to make about in
19 and out of prison is this artificial line that the Sixth
20 Circuit drew to cabin its per se rule. They said that
21 if the conduct takes place outside the prison per se you
22 get Miranda; if the conduct that they are questioning
23 talking about was inside the prison walls, we are not
24 going to do that.

25 And the Sixth Circuit was forced to make

1 that policy decision because otherwise prison
2 administration becomes very difficult. But under this
3 Court's precedent and under the Fifth Amendment itself,
4 there is nothing that would suggest that there should be
5 a distinction in the Miranda analysis as to the locus of
6 the conduct that is being questioned about.

7 And it's possible to have a very serious
8 in-prison crime, a murder of another inmate, and a very
9 nominal outside crime, petty theft, and yet the Sixth
10 Circuit would give pure Miranda protection to that petty
11 theft questioning and no protection at all to the person
12 who murdered someone inside the prison walls. And that
13 just demonstrates where the Sixth Circuit rule starts to
14 fall apart.

15 JUSTICE SOTOMAYOR: The Chief asked you in
16 his question which way does it cut, meaning you seem to
17 be advocating a rule that says merely because he's in
18 prison is irrelevant, standing alone. I think your
19 adversary is saying you can't take out the fact that
20 this person's liberty is restrained from the equation.

21 So going back to my hypothetical, if you are
22 forced to leave the prison, as this gentleman was, and
23 put in another room, what presumption should you start
24 with? Shouldn't the presumption be that if you are
25 forced to go to another place that you are in custody?

1 MR. BURSCH: Justice Sotomayor, I'm going to
2 start with the premise we are not advocating that the
3 prison conditions fall out of the equation entirely.
4 They are simply part of the mix that you consider, just
5 like you would consider the school environment or the
6 hospital environment or a customs environment.

7 With respect to being taken out to another
8 building, so long as a reasonable person in his position
9 would have felt free to go back, that is ultimately the
10 dispositive inquiry.

11 JUSTICE SOTOMAYOR: What -- what would make
12 someone who is forced to go somewhere think that they
13 are free to go back, absent being told? But what --
14 what would make any reasonable prisoner who can't move
15 without an escort believe that they are always free to
16 go back?

17 MR. BURSCH: Well, there are --

18 JUSTICE SOTOMAYOR: Once they are forced to
19 go from point A to point B.

20 MR. BURSCH: Right. There are three factors
21 here, and I'll quibble just a little bit with the
22 assumption that he was somehow forced to go. It's true
23 they didn't ask him if he wanted to go, but there is
24 also no contention that he resisted going and they made
25 him go anyway. What he said is: "I didn't know where

1 we were going. I felt like I was in a safe environment
2 so I didn't object."

3 Then once he got to the room, here are the
4 three that I think are the most critical facts: That he
5 was told right at the beginning: Just tell us; we'll
6 take you back to your cell when you want to do that.

7 Second, when he got belligerent they said:
8 If you don't want to cooperate, you will go back to your
9 cell. And third, when he asked to go back to his cell
10 that request is honored within the context of the
11 typical prison administration.

12 And it's very possible that in his everyday
13 prison life he could be taken over next door for a
14 medical exam, he could be taken over next door for a
15 visitor if that was county policy. But there is nothing
16 inherent about the walk into the next building that
17 means per se he has to be Mirandized. Again, it's just
18 one factor that should go into the mix, just like this
19 Court has always done in Miranda cases.

20 Unless the Court has any further questions,
21 I will reserve the balance of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. BURSCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Ms. Anders.

25 ORAL ARGUMENT OF GINGER D. ANDERS, ON

1 BEHALF OF THE UNITED STATES, AS AMICUS
2 CURIAE, SUPPORTING THE RESPONDENT

3 MS. ANDERS: Mr. Chief Justice, and may it
4 please the Court:

5 The Sixth Circuit has imposed a per se role
6 that whenever a prison inmate is isolated for
7 questioning about conduct that occurred outside the
8 prison, that inmate is in custody for Miranda purposes,
9 regardless of the circumstances of the interrogation.
10 But in the prison context, as in any other, the
11 traditional Miranda custody tests should apply and the
12 question should be whether, in light of all of the
13 circumstances, a reasonable person in the suspect's
14 position would have felt free to terminate the interview
15 and leave.

16 That is so for three reasons. The first is
17 that the Court reaffirmed in *Maryland v. Shatzer* that
18 restraints on a suspect's freedom of movement are a
19 necessary but not sufficient condition for Miranda
20 custody. In other words, a reasonable suspect whose
21 freedom of movement is restrained may nonetheless feel
22 that he is free to terminate the questioning.

23 Second, there are in fact many situations in
24 which a reasonable inmate isolated for questioning would
25 feel free to terminate the interrogation despite being

1 subject to background prison restrictions.

2 And third, the Sixth Circuit's per se rule
3 here requires Miranda warnings to be given in situations
4 in which the concerns about custodial interrogation that
5 drove Miranda are simply not present. That holding
6 impairs the important truth-seeking function of
7 investigations by requiring the suppression of voluntary
8 confessions made in noncustodial situations.

9 JUSTICE BREYER: Suppose the policeman said:
10 I'm taking you away with me for 20 minutes, period.
11 Takes him away, puts him in a place, asks him questions
12 for 20 minutes. Does he have to Mirandize him?

13 MS. ANDERS: You have to look to the
14 totality of the circumstances in that --

15 JUSTICE BREYER: Those are the totality.

16 MS. ANDERS: -- in that case.

17 JUSTICE BREYER: I just gave you the
18 totality.

19 MS. ANDERS: In that situation they may not
20 be in custody, because Shatzer established that simply
21 being in prison and subject to normal prison --

22 JUSTICE BREYER: No, no, no. I'm taking you
23 to a special room and in this special room I'm going to
24 ask you questions for 20 minutes.

25 MS. ANDERS: You would look to --

1 JUSTICE BREYER: There is no other
2 circumstance. That's it. Everything else is the same
3 as here, except he added those words. Now what?

4 MS. ANDERS: I think he may not be in
5 custody, because --

6 JUSTICE BREYER: Not in custody.

7 MS. ANDERS: -- because again you have to --

8 JUSTICE BREYER: He's only going to be there
9 for 20 minutes.

10 MS. ANDERS: You look to what the reasonable
11 inmate in that situation would feel --

12 JUSTICE BREYER: He would have thought he
13 could leave after 20 minutes.

14 MS. ANDERS: You would look to what the
15 reasonable inmate would feel, and in that situation you
16 would look to his experience with the prison, you would
17 look to the circumstances of the questioning, whether
18 they are accusatorial, whether they are pleasant.

19 JUSTICE BREYER: Okay.

20 MS. ANDERS: The location of the room.

21 JUSTICE BREYER: Now, outside. We walk
22 outside and there's a policeman in the street and he
23 says to someone who is a suspect: Come with me; I'm
24 taking you to jail; I'm going to ask you questions for
25 20 minutes. He takes him to a barred room, he can't get

1 out for 20 minutes. He has to Mirandize him?

2 MS. ANDERS: You may have to in that
3 situation.

4 JUSTICE BREYER: What's the difference?

5 MS. ANDERS: The difference is that the
6 person who is on the street, their baseline is that they
7 have complete free will, they have freedom of movement.
8 But when you look at the prison situation, the ultimate
9 question is whether the reasonable inmate would feel
10 free to terminate the questioning and one situation you
11 look to in determining are the physical restraints on
12 that person. And when you look at the restraints you
13 have to take into account the fact that the prisoner has
14 a baseline, which is that he has some restrictions on
15 his movement. That's what the Court said in Shatzer.

16 So when you look at the totality of the
17 circumstances, you consider the restraints and the
18 prisoner's baseline, but you also consider everything
19 else that happens during the questioning. So there
20 could be many situations in which the questioning will
21 go in a manner that tells the reasonable inmate that he
22 is free to leave. For instance, the most clear example
23 is when someone is actually told that they can leave.
24 But there could be many other examples as well.

25 JUSTICE KAGAN: Could I ask you a different

1 sort of question, Ms. Anders. Putting aside what the
2 Sixth Circuit did here, if you look back at the initial
3 State Court opinion, do you read the State court -- do
4 you think the State court is fairly read, could the
5 Sixth Circuit have fairly read it, as establishing its
6 own per se rule, which was the per se rule that we
7 rejected in Mathis? In other words, that the State
8 supreme court required some kind of nexus between the
9 prison custody and the interrogation?

10 THE WITNESS: I think the State court
11 opinions are somewhat unclear. There some statements
12 that could be taken to be inconsistent with Mathis, but
13 immediately after those statements the state Court said:
14 Well, it's not enough alone for custody that someone is
15 incarcerated on a conviction that's unrelated to their
16 questioning; and we look to the fact that the inmate was
17 told that he was free to leave and he actually felt free
18 to leave.

19 So I think the best reading of the State
20 court's opinions is that they did go through the
21 totality of the circumstances and they did conclude that
22 the Respondent reasonably felt that he was free to leave
23 in this interview. But more importantly, I think the
24 Sixth Circuit went much further than that and
25 established a per se rule that says, no matter what the

1 questioners do, no matter what a prisoner is told --
2 told, no matter how free he feels to leave, that person
3 always has to be Mirandized. And that extends Miranda
4 way beyond its initial concerns.

5 Voluntary confessions, this Court has
6 recognized, are an unmitigated good. So any time
7 someone confesses voluntarily in a noncustodial
8 situation, the Sixth Circuit's rule applied to prisons
9 would say that that person's confession would have to be
10 suppressed, even though it was given in a situation that
11 doesn't implicate Miranda's concerns at all.

12 I think the Sixth Circuit's rule really
13 arose from two assumptions. One was that isolation
14 alone is sufficient to create custody in all
15 circumstances. And that can't be the case, because we
16 know that an inmate can be told that he can leave, he
17 can be given an initial choice before he comes along for
18 questioning, he can be interrogated in isolation purely
19 because he is waiting to be treated in an infirmary.
20 There are any number of situations, I think, where an
21 inmate could be isolated for questioning, but he would
22 still feel free to leave.

23 Going to Justice Sotomayor's question about
24 whether someone in prison necessarily feels coerced, I
25 think that the Court in *Shatzer* established that

1 background restrictions incident to being incarcerated
2 are not in themselves sufficient to create Miranda
3 custody. So in other words, they don't create such a
4 huge coercive impact that nobody would feel free to
5 terminate questioning.

6 So I think accepting the proposition that
7 someone in prison is always coerced would lead to a per
8 se rule that says, no matter how non-accusatorial, no
9 matter how non-coercive that situation is, that person
10 would always be in custody.

11 So --

12 JUSTICE SOTOMAYOR: Well, going back to
13 confusing coercion issues with custody issues, and -- I
14 don't know that you have really answered Justice
15 Breyer's question. Someone's picked off the street and
16 told, you have to go into this room, and questions are
17 asked. Wouldn't we assume that that person is in
18 custody?

19 MS. ANDERS: I think in either situation,
20 you have to look to the totality of the circumstances.
21 And so we know that restraints alone -- the restraints
22 of prison aren't enough alone. And so when you consider
23 the restraints -- when you consider the -- the fact that
24 a prisoner is told he has to go into a room, you would
25 look not only to that fact, but you'd also look to

1 everything that happens in the questioning.

2 But then when you go back to consider the
3 fact that the prisoner was told that he has to come to
4 the room, you would -- you would look to whether it's a
5 normal prison policy that prisoners always have to be
6 escorted places, and so that would help the Court
7 determine whether --

8 JUSTICE SOTOMAYOR: Well, but he didn't
9 choose to go in that room. He was placed in that room.
10 What makes him think that if his jailers were walking
11 him somewhere, that he was free to leave?

12 MS. ANDERS: Well, I think two points. One
13 is that -- the fact that he is asked to -- the fact that
14 he is told he has to go to this room is not the only
15 circumstance of the interrogation. So certainly what
16 happens in the questioning can lead a reasonable
17 prisoner to believe that he is free to go, even though
18 he has been told he has to go to the questioning.

19 So if he is told he can leave, if it becomes
20 clear from experience, if there's a prison policy saying
21 that inmates can always leave, if he sees that he can
22 summon the guards. All of those circumstances have to
23 be taken into account in addition to the fact that he
24 was told initially that he has to go with the guard.
25 And the second thing --

1 JUSTICE GINSBURG: If he were and the police
2 officer said, come along with us, okay, he could say,
3 no. But here he didn't have that choice.

4 MS. ANDERS: That's right. He didn't have
5 that initial choice. But once he got into the
6 questioning, I think this case is a good example of what
7 can happen where the inmate here was told that he could
8 end the questioning. So the ultimate question for
9 Miranda custody is whether the reasonable person would
10 feel free to terminate the interrogation.

11 And so in considering all the circumstances,
12 one circumstance would be that the inmate was told he
13 has to come to the questioning, but another circumstance
14 would be that he was then told once he got there that he
15 could end the questioning.

16 So there are -- there are other factors like
17 that that --

18 JUSTICE GINSBURG: Is the -- is the time
19 relevant that this was done? They took him away at 7:00
20 in the evening and kept him for 7 hours.

21 MS. ANDERS: I think that would be a
22 relevant factor here, too, as would the fact that the
23 door was partially open, the questioning was not
24 threatening, there were only two officers --

25 JUSTICE GINSBURG: That didn't do him any

1 good, because he couldn't get back to his cell without
2 being escorted there.

3 MS. ANDERS: That's correct. That -- that
4 is a -- that's a background restraint of incarceration,
5 and in looking at whether that particular restraint made
6 the inmate feel that he couldn't terminate the
7 questioning, you would look both to the fact that, as he
8 himself said, it's common sense that inmates have to be
9 escorted to and from places in the prison. And also --

10 CHIEF JUSTICE ROBERTS: Counsel, I wonder
11 why you just agreed that the 7 hours would be a
12 pertinent circumstance. It strikes me that that would
13 be a pertinent circumstance on overall voluntariness,
14 perhaps, but once you are told you can leave whenever
15 you want, I don't see why it matters at all how long he
16 is kept there.

17 MS. ANDERS: I think that's exactly right,
18 that --

19 CHIEF JUSTICE ROBERTS: So it is not a
20 relevant circumstance on the custody question.

21 MS. ANDERS: It is a circumstance within the
22 totality of the circumstances here, but any kind of
23 effect that it had on making the inmate feel that he
24 couldn't terminate the question was entirely offset by
25 the fact that he was told that he could leave multiple

1 times.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Now Ms. Jacobs.

4 ORAL ARGUMENT BY ELIZABETH L. JACOBS

5 ON BEHALF OF THE RESPONDENT

6 MS. JACOBS: Mr. Chief Justice, and may it
7 please the Court:

8 I want to address the issue of whether
9 someone is free to leave. Recently, there have been
10 several cases, and Cervantes is one -- and I can't
11 remember whether it was Alvarado -- Alvarado or J.D.B. --
12 where the courts have said that in a prison setting the
13 statement that you are free to leave has less
14 significance than if you are in the free world.

15 So I would suggest that when you look at
16 this, that that particular issue, or that particular
17 statement, should not be given the same weight in prison
18 as out. And one of the reasons I suggest is because if
19 a prisoner is told he is free to leave and he's in
20 custody and we know he's in custody because he's in
21 prison, he really under these facts does not have the
22 capability of getting up and leaving --

23 JUSTICE SCALIA: Well, it certainly -- it
24 certainly doesn't mean he can leave the prison, right?

25 MS. JACOBS: Right.

1 JUSTICE SCALIA: That's clear, but -- but
2 isn't that the only difference? It certainly at a
3 minimum means that he can leave this interrogation.

4 MS. JACOBS: Prisoners --

5 JUSTICE SCALIA: But what could it possibly
6 mean if it didn't mean you could leave this room where
7 you are now being questioned?

8 MS. JACOBS: Let me answer that question by
9 pointing out that in -- I believe it's Georgison and
10 Cervantes where there is a button, and the prisoner has
11 the ability to go and press the button and call his own
12 jailers.

13 In this case, the prisoner had to rely on
14 the sheriff's deputies that were interrogating in order
15 to effectuate his freedom. And in fact, he has
16 testified that he said he wanted to -- I think he said
17 that he didn't want to answer any questions, or he
18 wanted to leave, and we don't hear any more about it --
19 about that. Why not? Because at that point, no one
20 allowed him to leave because the officers hadn't gotten
21 the answers they wanted.

22 JUSTICE ALITO: What is the rule that you
23 want us to adopt?

24 MS. JACOBS: The rule I want you to adopt is
25 the rule in Mathis. And it seems that it has already

1 been adopted, but I think that based on what the --

2 JUSTICE ALITO: So everybody in prison is in
3 custody at all times.

4 MS. JACOBS: Right. But if --

5 JUSTICE ALITO: So if you want to question
6 anybody in prison about anything, you have to give them
7 Miranda warnings.

8 MS. JACOBS: No. And I don't think that's
9 what Mathis said. I think Mathis was very specific,
10 that a police officer coming from the outside to the
11 inside to talk about a crime occurring on the outside
12 must be given a Miranda warning.

13 JUSTICE ALITO: What sense does that make?
14 Why is one more in custody depending on the subject that
15 the police want to question the person about?

16 MS. JACOBS: And in certain circumstances, I
17 agree with you, that in fact, this Court should hold
18 that when the correction officers are investigating a
19 crime within the prison, then -- and they remove the
20 prisoner and they isolate him, take him out of the
21 general population, that this Court should then hold
22 Miranda is applicable. But when it's voluntary --

23 JUSTICE ALITO: So whenever -- so whenever a
24 prisoner is isolated and questioned about a crime, no
25 matter where it occurs, the Miranda warning has to be

1 given?

2 MS. JACOBS: Yes.

3 JUSTICE ALITO: About a possible crime?

4 MS. JACOBS: Yes. I mean -- there doesn't
5 seem to me to be possible crimes. They always turn out
6 to be crimes.

7 JUSTICE KAGAN: Well, how is that consistent
8 with the totality of circumstances test that we've
9 always insisted upon in Miranda cases?

10 MS. JACOBS: Well, Miranda -- not all the --
11 there are bright-line rules attached to Miranda, so that
12 Miranda itself is a bright-line rule. So to stay a
13 bright-line rule I don't think is outside the purview of
14 Miranda -- of Miranda law. And it's easier for the
15 officers to apply; it's easier for the courts to apply;
16 and there would be more consistency.

17 But, Justice Alito, I want to make sure that
18 you understand that I think if it's on-the-scene
19 questioning about a crime occurring on prison, that I
20 don't think he has to give Miranda rights; that if it's
21 voluntary, if the officer -- if the defendant comes up
22 to an officer and starts chatting away and starts
23 mentioning a crime, that's voluntary. And that is
24 consistent with Miranda. I don't think you really have
25 to break new ground --

1 JUSTICE ALITO: If the prisoner is stabbed
2 in the yard, and there are 50 prisoners in the yard at
3 the time and the prison guards want to question
4 everybody to see what they saw, they all have to be
5 given Miranda warnings?

6 MS. JACOBS: Well, that's an interesting
7 fact situation, because some of those people are just
8 witnesses and they are not necessarily suspects. And a
9 guard might be able to say: Well, the people that were
10 in this narrow area, they are possible suspects.
11 They're going to get --

12 JUSTICE KENNEDY: No, no. No, no, that's
13 not the way Miranda works. Miranda suppresses a
14 statement that is adverse to the person who was
15 questioned. And the police doesn't know when the
16 adverse statement's going to come. So you are running
17 away from the hypothetical. It just doesn't work.

18 MS. JACOBS: I -- I'm sorry, but I had
19 thought that what Miranda also said is if it's a
20 witness, and you know -- you believe that it's a
21 witness, and that you are not asking questions that are
22 going to incriminate them, that then you don't have to
23 give Miranda. Once the point it becomes -- thank you.

24 JUSTICE KENNEDY: Well --

25 MS. JACOBS: Once the point it becomes

1 incriminating, then you give them Miranda rights.

2 JUSTICE ALITO: If it's a witness in the
3 outside world, the witness is unlikely to be in custody.

4 MS. JACOBS: I understand, but I thought
5 your hypothetical had to do with being stabbed in the
6 yard.

7 JUSTICE ALITO: It does.

8 MS. JACOBS: Okay.

9 JUSTICE ALITO: So these -- all these people
10 in your view are in custody, and they all are being
11 asked questions that may incriminate them --

12 MS. JACOBS: If they --

13 JUSTICE ALITO: -- and they don't have to be
14 given Miranda warnings unless they are suspects.

15 MS. JACOBS: If they are removed from the
16 general population, if they are taken by a corrections
17 officer to a cell where they are going to be
18 interrogated; they are isolated; it is incommunicado;
19 they are being interrogated by officers; they know they
20 are officers -- they have some Miranda choices --

21 JUSTICE ALITO: When will that not occur?
22 In my hypothetical, the stabbing in the yard, you mean
23 you think the guards are going to say, "Okay, all you
24 guys stay here, now we're all -- we're going to question
25 each of you individually with everybody else, the 49

1 other prisoners present"?

2 MS. JACOBS: I think -- I think at that
3 point they are going to put the people that were in the
4 yard back in their cells. And then they are going to
5 take them out.

6 JUSTICE ALITO: And then they will be
7 isolated.

8 MS. JACOBS: Yes.

9 JUSTICE ALITO: So they all will get Miranda
10 warnings.

11 MS. JACOBS: So they will get Miranda.
12 You're -- you know. And I understand the Court's
13 concern that you might lose, you might lose evidence;
14 but Miranda is going to protect us from false
15 confessions, which is even a greater cost to society
16 than -- than having to give the Miranda rights.

17 JUSTICE KAGAN: And where do you get this
18 focus on isolation from? I mean, it's never mentioned
19 in Mathis. You said let's go back to Mathis, but that's
20 not a part of Mathis, is it?

21 MS. JACOBS: It's -- well, I've got two
22 answers for that. One, it's -- it's the basis of
23 Miranda, that when you isolate someone, when you talk to
24 them incommunicado, that that -- there are compelling
25 pressures that only Miranda rights will dispel. Such as

1 -- and -- let me just answer one other question.
2 Telling someone they have got the freedom to leave is
3 not a substitute for Miranda.

4 But now let me go back to Mathis. In Mathis
5 the court said he was in a cell. So I draw that -- the
6 inference that he was isolated, that he's in a cell,
7 he's got agents with him, and that that's isolation.
8 He's not in a prison library --

9 JUSTICE GINSBURG: I thought that there was
10 no discussion of the "in custody" point in Mathis. It
11 was assumed that they were in custody, and the issue was
12 whether he could be questioned about a crime other than
13 the one for which he was being held.

14 MS. JACOBS: I read Mathis as to say that he
15 was in custody for the -- for the question of the crime.
16 The police officers came in, they have him in a cell;
17 it's a police-dominated atmosphere; and that they're
18 questioning about a crime that occurred outside the
19 prison. To me, that's Miranda.

20 CHIEF JUSTICE ROBERTS: Well, Justice
21 Ginsburg is quite right. That -- that was not the issue
22 in Mathis. The argument in Mathis was: We're
23 questioning him about something else, so we don't have
24 to give him Miranda warnings. And that's the question
25 that the Court decided.

1 I don't think it had any discussion about
2 whether -- there was certainly not the argument of
3 whether he was in custody or not. The argument was this
4 is a different crime, so we don't have to give you
5 Miranda, and the Court rejected that. So how does that
6 clearly establish the law on which the court relied in
7 this case?

8 MS. JACOBS: In Mathis, because he was -- I
9 guess it was the lower court thought that because he was
10 not in custody on the crime of which they were going to
11 ask questions --

12 CHIEF JUSTICE ROBERTS: Right.

13 MS. JACOBS: -- that therefore you didn't
14 have to give him Miranda.

15 CHIEF JUSTICE ROBERTS: Right.

16 MS. JACOBS: But I think what the Supreme
17 Court was implying is that it doesn't matter what --
18 what you are in -- in prison for; you are in custody at
19 that point that you are in the cell with these officers.

20 CHIEF JUSTICE ROBERTS: Do you know, where
21 exactly in Mathis?

22 MS. JACOBS: I'm saying --

23 CHIEF JUSTICE ROBERTS: It's only about five
24 pages long. Can you show me where they have that
25 discussion about custody, as opposed to a discussion

1 about what crime is being discussed.

2 MS. JACOBS: What I'm saying is that it is
3 implied by Mathis.

4 CHIEF JUSTICE ROBERTS: Exactly.

5 MS. JACOBS: You can infer it from Mathis.

6 CHIEF JUSTICE ROBERTS: Exactly. It's
7 implied. Inferred. How --

8 MS. JACOBS: But that --

9 CHIEF JUSTICE ROBERTS: Is that clearly
10 established law?

11 MS. JACOBS: Yes. I think it is clearly
12 established law; it does not break any new ground for us
13 to apply it. It does not break any new ground. I think
14 Mathis is a very limited case. The holding applies to
15 police by officers only, not to corrections officers,
16 and I think that it does stand for the principle that if
17 you are in custody, and they are talking to you about --

18 JUSTICE KAGAN: Well, do you agree --

19 CHIEF JUSTICE ROBERTS: Do you agree that
20 this is not -- what you want to derive from Mathis is
21 not part of the holding of Mathis?

22 MS. JACOBS: I think it's a rational -- I
23 think it's a rational extension.

24 CHIEF JUSTICE ROBERTS: It's an extension.

25 MS. JACOBS: But that doesn't necessarily

1 mean that it's new law.

2 JUSTICE GINSBURG: I thought you were going
3 back to Miranda itself, which says in custody or
4 otherwise deprived of his freedom of action in any
5 significant way.

6 MS. JACOBS: Yes.

7 JUSTICE GINSBURG: So -- and I think you've
8 repeated the phrase from -- from Miranda that what the
9 -- what it was aiming at was incommunicado interrogation
10 of an individual in a police-dominated atmosphere. The
11 question is whether the Court has modified what Miranda
12 said in -- in that regard.

13 MS. JACOBS: Which court? This Court, or
14 the Sixth Circuit?

15 JUSTICE GINSBURG: This Court, this Court,
16 because this Court now seems to assume that it must be
17 in custody and not -- not otherwise deprived of action,
18 that being in custody is essential.

19 MS. JACOBS: I -- I read that as still being
20 the law, that there are the two clauses; one is you are
21 under arrest, and the other is your freedom of movement
22 is restricted such that a reasonable person would think
23 that you were not -- that you were not free to leave.

24 I'm sorry, Justice Ginsburg; have I answered
25 your question?

1 JUSTICE GINSBURG: Yes, I think you did.

2 CHIEF JUSTICE ROBERTS: I'm not sure you
3 answered mine from before.

4 MS. JACOBS: I'm sorry.

5 CHIEF JUSTICE ROBERTS: How do you think
6 that your argument or the decision of the court below
7 was implicit in or an extension of Mathis? Mathis says
8 you don't -- you're -- you are not free of Miranda just
9 because it's a different crime. How does that answer
10 the issue before the Sixth Circuit in this case?

11 MS. JACOBS: I think that when -- when the
12 Sixth Circuit is analyzing the State court decision,
13 they are looking at the State court decision, and that
14 decision says if there's no nexus between what you are
15 being questioned about and what you are in custody for,
16 then you don't have to get Miranda.

17 So I think the Sixth Circuit found that to
18 be contrary to the language in Mathis.

19 CHIEF JUSTICE ROBERTS: Well, I thought what
20 we have been arguing about is not the nexus issue, but
21 instead whether in light of the circumstances or under
22 an absolute rule there is custody.

23 MS. JACOBS: I think we are arguing about
24 two things. I think the Court is going to have to
25 decide two things, and one is whether the Sixth

1 Circuit's decision about whether the State court's
2 decision was contrary to clearly established law, I
3 think that's one decision. And the other decision is
4 whether there is going to be this per se rule about
5 whether if you're -- whether you're in custody or not
6 and under what circumstances there might be a per se
7 rule.

8 CHIEF JUSTICE ROBERTS: And what is the
9 clearly established law set forth in our cases that
10 answers that latter question?

11 MS. JACOBS: Whether -- if there is a per se
12 rule? There is not a clearly established law. There
13 could be -- under a rational extension issue, but it's a
14 little more attenuated. But I don't think that I --
15 that there -- that the Respondent would lose on that
16 issue. He would still win, because the Sixth Circuit's
17 decision is not wrong; the State court's decision is
18 contrary to the clearly-established law of Mathis.

19 JUSTICE ALITO: Can I can you this? Suppose
20 you have this situation: the police officers go to a
21 prison. The -- a prisoner is brought to an interview
22 room, and the police officers are there with that
23 prisoner in the interview room. They say to him: We
24 are investigating allegations that you committed child
25 abuse. Now, you are free to leave if you want to, and

1 we will see that you go back to your cell right away.
 2 He says, No, no, I want to explain this; I welcome this
 3 opportunity to speak to you. Do they have to give him
 4 Miranda warnings?

5 MS. JACOBS: I think they do, because I
 6 think that telling him that he is free to go is not a
 7 substitute for Miranda. It does not protect the Fifth
 8 Amendment right, and I think we look to Dickerson, which
 9 said that, even though section 3501 said that you had to
 10 inform defendants of certain rights, it didn't cover all
 11 of the Miranda rights. And they said you had to cover.
 12 It doesn't necessarily have to be in the same language,
 13 but you have to cover those rights.

14 I think what the Petitioner wants you to
 15 adopt is a -- is a rule that says telling someone
 16 they're free to go is a substitute for Miranda; and it
 17 isn't. It does not protect the Fifth Amendment right.

18 JUSTICE GINSBURG: Well, their question --
 19 the question is, is the person entitled to Miranda
 20 warnings? And the argument has been that they're not
 21 entitled to Miranda warnings unless you are in custody.
 22 They say: We want to have a per se rule for "in
 23 custody," that is, if you are taken out of your cell and
 24 put in another place under police guard and questioned.

25 MS. JACOBS: That's correct. They have

1 taken him from his normal routine. They have exercised
2 control over him. They've moved him to another location
3 where I'm assuming from Justice Alito's hypothetical
4 that he is isolated from the general prison population.
5 And they are starting to tell him they are going to
6 question him about child sexual abuse charges. I don't
7 see how you can't --

8 JUSTICE ALITO: But they said: We would
9 like to talk to you about it; but you don't have to talk
10 to us; you are free to go. And he says immediately:
11 No, no, there is a misunderstanding here; I want to
12 explain this; I am glad you came and asked me about
13 this; I don't want to go back to my cell. And you say
14 that's coercive.

15 MS. JACOBS: I think -- I think you are now
16 describing him as being much nicer than I had assumed he
17 was the first time around. If the officer is not being
18 confrontational, I think maybe that's one thing that has
19 to be considered. I would think that you have to give
20 him Miranda rights.

21 Let me just go over a few issues that I
22 wanted to make sure got mentioned. The Sixth Circuit
23 decision, I got kind of, I think, carried away in my
24 brief. The Sixth Circuit decision very clearly rests on
25 the contrary clause. On page 10 A of the Petitioner's

1 appendix, they state what their decision is going to be,
2 that is, that it's contrary to clearly established
3 Supreme Court law. Then they do four more pages to page
4 14 A in which they talk about why the State court's
5 decision was contrary. And it's only after they say
6 that -- They give their reasoning. They state their
7 rule that they say: But if there's any doubt, then
8 let's look at Shatzer, which was not clearly established
9 law at the time of this case.

10 CHIEF JUSTICE ROBERTS: Can I -- Since we
11 are talking about the Sixth Circuit decision, what it
12 says is, this is on page 10 A, "The central holding of
13 Mathis is that a Miranda warning is required whenever an
14 incarcerated individual is isolated from the general
15 prison population and interrogated, i.e., questioned in
16 a manner likely to lead self-incrimination about conduct
17 occurring outside of the prison." Is that a correct
18 description of Mathis?

19 MS. JACOBS: Yes.

20 CHIEF JUSTICE ROBERTS: I thought Mathis
21 rejected the argument that it depends on whether the
22 crime is the one you are in prison for or something
23 else.

24 MS. JACOBS: I'm sorry. I thought that that
25 was what you said at the end. I apologize. I think

1 that the Sixth Circuit decision makes it very clear that
2 they are talking about crimes occurring outside the
3 prisons; that they have draw on that kind of dichotomy.
4 So --

5 CHIEF JUSTICE ROBERTS: Well, the first
6 part, Miranda warning is required whenever an
7 incarcerated individual is isolated from the general
8 prison population, okay? And interrogated, i.e.,
9 questioned or whatever. Now does that address all of
10 the issues? Is that -- Where in Mathis is the
11 discussion about whenever an incarcerated individual is
12 isolated from the general prison population?

13 MS. JACOBS: I thought that it was between
14 10 A, page 10 A and page 14 A.

15 CHIEF JUSTICE ROBERTS: No, no, where in
16 Mathis?

17 MS. JACOBS: This was the question that we
18 talked about before, and what I'm saying is that I
19 believe that they are implying that and were inferring
20 that. And that it might not be a clearly stated
21 principle that it's from outside the prison, but that it
22 certainly foreshadows -- that that rule is foreshadowed
23 so it's not unusual that --

24 CHIEF JUSTICE ROBERTS: If the argument were
25 that Miranda was not required because this concerns a

1 different crime than what you are in prison for here. I
2 understand the idea that under AEDPA that Mathis is
3 clearly established law. The issue here, however, as
4 the Sixth Circuit put it is a warning is required
5 whenever an incarcerated individual is isolated from the
6 general prison population. And I jut don't see that
7 anywhere in Mathis.

8 MS. JACOBS: I again say that this is what
9 one infers from Mathis.

10 CHIEF JUSTICE ROBERTS: Okay.

11 MS. JACOBS: That's the general principle.

12 JUSTICE KENNEDY: And what you infer is the
13 rule that incarceration constitutes custody.

14 MS. JACOBS: No. Custody is when the
15 prisoner is isolated, incommunicado, outside the general
16 prison population, and he is being asked questions by
17 law enforcement officers designed -- that are designed
18 to incriminate him. I think it's the
19 traditional Miranda --

20 JUSTICE KENNEDY: That is Shatzer, and
21 Shatzer was careful to say we've never decided that
22 issue.

23 MS. JACOBS: I think what Shatzer was
24 saying, and I know it's hard for me to tell you what
25 Shatzer is saying since you decided Shatzer, but I think

1 that Shatzer seems to be aimed at correction officials,
2 that whether correction officials -- I think Shatzer is
3 saying we never decided the whole issue. And I think
4 that Mathis --

5 JUSTICE KENNEDY: Well, it states in broader
6 terms. It says we've never decided whether
7 incarceration constitutes custody for Miranda purposes.
8 And indeed they explicitly declined to address the
9 issue.

10 MS. JACOBS: But I think --

11 JUSTICE KENNEDY: It talks about Bradley,
12 which was definitely litigation.

13 MS. JACOBS: I think that Shatzer was
14 referring to the whole umbrella of -- of people that
15 would come into the prison, including people that would
16 be in the prison and want to talk to -- to prisoners.
17 So I think Shatzer was talking about not just police
18 officers, but correction officials. I think Mathis
19 clears up police officers, you come in, you are going to
20 talk about something else, you are going to
21 interrogate -- Miranda.

22 Shatzer finishes this line of cases by
23 saying it applies to -- it will apply to correction
24 officials as long as you take the gentleman out of the
25 general prison population and isolate him.

1 JUSTICE KAGAN: Ms. Jacobs, wouldn't it be
2 fair to say -- it seems to be me that Shatzer must --
3 excuse me, Mathis must have found that Mr. Mathis -- the
4 Court in Mathis must have found that Mr. Mathis was in
5 custody. That would be a fair inference for Mathis?

6 MS. JACOBS: Yes.

7 JUSTICE KAGAN: But we have no idea why the
8 Court thought that Mr. Mathis was in custody. That
9 wasn't at issue in the case. The Court doesn't talk
10 about any of the surrounding factual circumstances.
11 There might have been 1,000 things we don't know about
12 that led everybody to assume -- that was -- that led
13 everybody to assume that Mr. Mathis was in custody. Not
14 the particular things that the Sixth Circuit mentioned.

15 MS. JACOBS: I think that Mathis does
16 mention factors that went into the decision about
17 whether he was in custody. They talk about him being in
18 a cell, not in the prison law library, not in the
19 conference room, not in the visitor's room -- being in
20 the cell, with the officers and as being interrogated.

21 I think that they very clearly are saying,
22 that this -- I think it's establishing this principle
23 that Mathis -- that my case -- that *Howes v. Fields*
24 applies.

25 CHIEF JUSTICE ROBERTS: Isn't the best you

1 can say, not that Mathis found but perhaps that Mathis
2 apparently assumed that he was in custody, because there
3 is no discussion of it?

4 There is no discussion of the custody --

5 MS. JACOBS: I agree.

6 CHIEF JUSTICE ROBERTS: Yes, they give a
7 factual recital, he was in his cell and all that.

8 MS. JACOBS: I just don't think -- I don't
9 doubt that they thought that Mathis was in custody,
10 which is why they were talking about Miranda to begin
11 with. He's in a cell.

12 JUSTICE KAGAN: But we don't know why they
13 thought Mathis was in custody. It just wasn't an issue
14 in the case. Everybody had assumed it.

15 MS. JACOBS: And it's not dicta; as far as I
16 can tell it becomes part of clearly established law. It
17 was a court --

18 CHIEF JUSTICE ROBERTS: What is dicta?
19 Dicta is something that is said that is not necessarily
20 to the holding.

21 MS. JACOBS: Right.

22 CHIEF JUSTICE ROBERTS: You don't have
23 anything that is said about it here.

24 MS. JACOBS: But I -- my argument, Justice
25 Roberts, is that saying that he is in a cell and that he

1 is being questioned, by officers, that that is -- and
2 he's being questioned about a crime, that that is
3 custody; and from that there is a principle.

4 I would just like to close by saying again
5 that I would ask you to reject the -- the Petitioner's
6 proposition that saying someone is free to leave is a
7 substitute for Miranda warning; that my client was very
8 clearly in custody, that in fact -- and I think this is
9 an interesting part of this case -- in a sense custody
10 had been transferred. That he really was no longer in
11 custody of the jail, but that he had been -- once he
12 went through the J door, was turned over to the
13 sheriff's deputies, and the other guards left, that
14 custody of him had been transferred. So I think he is
15 clearly in custody, and I think that's one of the things
16 that this Court must look for or include in a per se
17 rule, whether -- who is holding this man in custody?

18 Further, the fact that he was told that he
19 could leave is not significant on the facts of this
20 case. The fact that the officers -- and I think Justice
21 Kennedy made this point -- that the officers were
22 yelling at him; they are the ones that have control over
23 him. He does not have the control. The fact that he
24 was missing his medication shows that he did not think
25 that he had the power to change his situation.

1 JUSTICE GINSBURG: There is no indication
2 that he told them -- that he told the --

3 MS. JACOBS: No, I agree there isn't.

4 JUSTICE GINSBURG: -- officers that he
5 needed medication.

6 MS. JACOBS: No, I agree that there isn't.
7 But I think that this is one of the things that -- that
8 was playing on his mind, and although I understand that
9 this is an objective test and not a subjective test, I
10 think that that lends credibility to his testimony at
11 the hearing. Harrington versus --

12 JUSTICE SOTOMAYOR: The first Ohio court --
13 I'm sorry, the court below -- had its own -- seemingly
14 had its own absolute rule, yet -- that if you are told
15 you're free to go, that that breaks the chain of
16 custody, whatever that might mean. Assuming -- and the
17 Sixth Circuit said if you are removed from the prison
18 and questioned, you -- you absolutely must be given
19 warnings. Is there a middle ground, and what would that
20 middle ground be? And what -- how would that middle
21 ground affect the outcome of this case?

22 MS. JACOBS: I don't believe that telling a
23 prisoner that he's free -- that he's free to leave -- is
24 a substitute for Miranda. I think you have to get back
25 to what Miranda was trying to protect. It was trying to

1 protect systematic rights, and telling him he is free to
2 leave does not do that. So the facts are not enough,
3 and that should be part of the equation. Now, they --

4 CHIEF JUSTICE ROBERTS: Counsel, you
5 mentioned several times, when we were talking about
6 Mathis, that, you know, they mentioned he was in -- in a
7 cell, right? I've just been skimming it quickly. I
8 don't see where that's mentioned. Do you know offhand?

9 MS. JACOBS: No, I don't, but I really --
10 really did brief the case. And I'm sure that it said
11 that as well --

12 CHIEF JUSTICE ROBERTS: I did, too. And --
13 and I -- well, I'll look at it again. I'm sure it's --
14 I'm sure it's there --

15 MS. JACOBS: Great.

16 CHIEF JUSTICE ROBERTS: All I see is noting
17 that he was in prison serving a State sentence, but --

18 MS. JACOBS: But it definitely -- it should
19 be talking about the officers, the agents in the cell
20 with him.

21 CHIEF JUSTICE ROBERTS: Okay.

22 MS. JACOBS: Just as a -- as a final
23 comment, I just want to say that *Harrington v. Richter*
24 requires a finding before a writ can issue of an extreme
25 malfunction in the justice system, that certainly where

1 a State court has decided a constitutional issue --
2 under Supreme Court law and ignores Supreme Court law,
3 that we really do have an extreme malfunction of the
4 Supreme Court decision. This Court should affirm the
5 decision of the Sixth Circuit and send Mr. Fields back
6 to Lenawee County for a new trial.

7 If there are no further questions, I cede
8 the remainder of my time for the Court.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Mr. Bursch, you have six minutes remaining.

11 REBUTTAL ARGUMENT OF JOHN J. BURSCH

12 ON BEHALF OF THE PETITIONER

13 MR. BURSCH: I think the hypotheticals today
14 demonstrate how quickly the logic of the Sixth Circuit's
15 new per se rule falls apart when you test it with other
16 facts. Even in the Sixth Circuit's view, you would
17 already would make exceptions to that new per se rule if
18 it was in-prison conduct or if it was prison guards as
19 opposed to outside guards. In response to questions
20 today, Mr. Fields' counsel admits that there must be an
21 exception if you have a button that you can press to get
22 out, like in Mr. Ellison's situation, the First Circuit
23 case that Justice Souter wrote. She admitted that if
24 you are in a circle of proximity, or not in a circle of
25 proximity, that that would make a difference. No per se

1 rule. And that if the situation isn't confrontational,
2 that you need to have an exception for that, or if the
3 prisoner initiates questioning.

4 And you can imagine many other hypotheticals
5 that would similarly create exceptions to what is
6 supposedly a per se rule. And -- and ultimately what
7 this comes down to is Justice Alito's question: If he
8 is under no pressure at all, the prisoner welcomes the
9 questioning, and I would submit that a fair reading of
10 the record here shows exactly that, that even then it
11 would be required. And that is a particularly strange
12 rule. But what we are talking about is not a
13 constitutionally mandated protection but a prophylaxis,
14 something that is supposed to protect a constitutional
15 right, and where the protection isn't necessary, nor
16 there should be a per se rule.

17 Counsel concedes that there isn't anything
18 in Mathis that clearly establishes the rule that the
19 Sixth Circuit applied. Maybe it's an extension, maybe
20 it's implied -- I think it's difficult to find either
21 one of those -- but at a bare minimum, this requires
22 reversal under the AEDPA standard. I do want to
23 emphasize that the Sixth Circuit's per se test does have
24 societal cause; it impedes prison administration and
25 eliminates potential for voluntary truthful confessions

1 that we all want. Finally, the test that we advocate
2 for is not our own per se test, that simply saying
3 you're free to leave is not the be-all, end-all.
4 Because it's possible that officers could say you are
5 free to leave while doing something else nonverbally
6 that indicates you are not free to leave.

7 That's why a totality of circumstances test
8 makes the most sense. We urge you to go past the AEDPA
9 question and actually rule on the merits, because we
10 think that would be good guidance for the lower courts
11 and for law enforcement officials, and the test that we
12 would propose is that a Miranda warning is not required
13 when a reasonable person in the prisoner's position
14 would have felt free to go back to his cell in
15 accordance with ordinary reasonable prison procedures.
16 That is exactly what happened here. We respectfully
17 request that you reverse.

18 Unless there are further questions, I will
19 cede my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 1:53 p.m., the case in the
23 above-entitled matter was submitted.)

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